LEE KAM CHUN

v.

SYKT. KUKUH MAJU SDN. BHD.; SYKT. PERUMAHAN PEGAWAI KERAJAAN SDN. BHD. (GARNISHEE)

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 24-361-86]
11 DECEMBER 1987

CIVIL PROCEDURE: *Garnishment - Retention money held by employer of contractor - Building contract - Judgment-debtor was at all material times contractor of garnishee - Order of garnishee to show cause obtained on 15 September 1986 and served on garnishee on 18 September 1986 - Termination of building contract on 22 September 1986 - Whether retention sum with employer of contractor (garnishee) attachable at instance of Judgment-creditor of contractor (Judgment-debtor).*

This was an appeal by the garnishee against the decision of the Senior Assistant Registrar, High Court Ipoh who decided the dispute between the garnishee and the judgment-creditor in favour of the judgment-creditor.

The issue in this case was whether the retention sum held, by the employer of a contractor (garnishee) was attachable at the instance of a judgment-creditor of the contractor (the judgment-debtor) by way of garnishee proceedings.

Held:

[1] As the order of garnishee to show cause dated 15 September 1986 was served on the garnishee on 18 September 1986 before the notice of termination of the building contract dated 22 September 1986 was issued to the judgment-debtor the said notice of termination would not affect the right of the judgment-creditor who should therefore have priority over the garnishee.

[2] The appeal was dismissed with costs and the garnishee order absolute made by the learned Senior Assistant Registrar was confirmed.

[Appeal dismissed with costs. Garnishee order absolute confirmed.]

Cases referred to:

Dunlop Ranken Ltd. v. Hendall Steel Structures Ltd. with Pitchers Ltd. as garnishee [1957] 3 All ER 344

O'Driscoll v. Manchester Insurance Committee (1) [1915] 113 LT 683

Rayack Construction Ltd. v. Lampeter Meat Co. Ltd. [1979] 12 BLR 34

Grant Plant Hire v. Trickey, with Beaconsfield Urban Dist. Council as garnishee [1961] Sol J 105

For the plaintiff (judgment-creditor)/respondent - Tony Wong; M/s. Thevin Chandran Siva Wong & Jamal

For the garnishee/appellant - K.O. Tang; M/s. Ariff & Co.

JUDGMENT

Peh Swee Chin J:

This matter raises a point of considerable controversy, all involved in a number of cases pending that such controversy should at least be laid to rest at least at the level of this Court.

The controversy concerns retention money held frequently by an employer of a contractor, or a person in the shoes of such an employer of such a contractor in connection with the usual building contracts which provide in each case, for a small percentage of value for work done by the contractors to be deducted and retained by the employer in order to have recourse to it later usually for making good any defect in such work.

The controversy turns on the question as to whether such retention sum in the hands of the employer is attachable at the instance of a judgment-creditor of the contractor (the judgment-debtor), by way of garnishee proceedings.

The facts are that the plaintiff (hereafter called judgment-creditor) has obtained judgment for sum of RM83,786.20 against the defendant (hereafter called judgment-debtor) for work done. The judgment-debtor was at all material times a contractor of the garnishee by virtue of a building contract in respect of 30 units of 2-storey terrace-houses at Taiping.

Clause 30 of the Building Contract provides as follows:

30(1) At the period of Interim Certificate named in the appendix to these conditions the architect shall issue a certificate stating the amount due to the contractor from the Employer, and the contractor shall, on presenting any such certificate to the Employer, be entitled to payment therefor within the period for honouring certificates named in the appendix to these conditions. Interim valuations shall be made whenever the architect considers them to be necessary for the purpose of ascertaining the amount to be stated as due in an interim certificate.

(2) The amount stated as due in an interim certificate shall, subject to any agreement between the parties as to stage payments, be the total value of the work properly executed and of the materials and goods delivered to or adjacent to the works for use thereon up to and including a date not more than seven days before the date of the said certificate less any amount which may be retained by the employer (as provided in sub-clause [3]of this condition) and less any instalments previously paid under this condition. Provided that such certificate shall only include the value of the said materials and goods as and from such time as they are reasonably, properly and not prematurely brought to or placed adjacent to the works and then only if adequately protected against whether or other casualties.

(3) The Employer may retain the percentage of the total value of the work, materials and goods referred to in sub-clause (2) of this condition which is named in the appendix to these conditions as percentage of certified value retained. Provided always that when the sum of the amounts so retained equals the amount named in the said appendix as limit of retention fund or that amounts as reduced in pursuance of Clause 16(f) and/or Clause 27(e) of these Conditions, as the case may be, no further amounts shall be retained by virtue of these sub-clauses.

(4) The amounts retained by virtue of sub-clause (3) of this condition shall be subject to the following rules:

(a) The employer's interest in any amounts so retained shall be fiduciary as trustee for the contractor (but without obligations to invest) and the contractor's beneficial interest therein shall be subject only to the right of the employer to have recourse thereto from time to time for payment of any amount which he is entitled under the provisions of this contract to deduct from any sum due or to become due to the contractor.

(b) On the issue of the Certificate of Practical Completion the architect shall issue a certificate for one moiety of the total amounts then so retained and the contractor shall, on presenting any such certificate to the employer, be entitled

to payment of the said moiety within the period for honouring certificates named in the appendix to these conditions.

(c) On the expiration of the defects liability period named in the appendix to these Conditions, or on the issue of the Certificate of Completion of Making Good Defects, whichever is the later, the architect shall issue a certificate for the residue of the amounts then so retained and the contractor shall, on presenting any such certificate to the employer, be entitled to payment of the said residue within the period for honouring certificate named in the appendix to these conditions.

It will be apparent that the building contract is of a fairly common type. To enable the judgment-debtor/contractor to get on with the work, the architect would issue interim certificate for total value of the work done and of the materials and goods supplied, subject to a retention at the rate of 10% of such value as provided in the appendix to the contract.

Clause 30(4)(a) would appear practically to declare such retention sum as money belonging beneficially to the judgment-debtor and held by the employer/garnishee as a trustee, and that by Clause 30(4)(b), a refund of ½ of such retention sum would be made to the judgment-debtor on the issue of a "certificate of practical completion", i.e. in effect a certificate of substantial completion by the architect, and Clause 30(4)(c) provides that on the expiry of defects-liability period, (12 months according to the appendix), or on the issue of "certificate of completion of making good defects", whichever is the later, the architect would issue a certificate for the residue of such retention to be paid.

An order of garnishee to show cause which was obtained *ex parte* by the judgment-creditor against the garnishee herein dated 15 September 1986 was served on the garnishee on 18 September 1986.

According to the garnishee, an employer of the judgment-debtor with the latter as its contractor, it had by letter dated 22 September 1986, terminated the contract between them and had appointed another contractor to carry on the work.

It may be interesting to point out that the retention sum in question now totals approximately RM313,000 and the work for which the judgment was obtained by the judgment-creditor, was performed at the site of the garnishee in question for the benefit of the garnishee.

The dispute between the garnishee and the judgment-creditor was referred by me to be heard before the learned Registrar who decided after a hearing in favour of the judgment-creditor, and from her decision the garnishee has appealed to me.

Before me, the garnishee first contended that the retention was not due and payable to the judgment-debtor, because the contract between the garnishee and the judgment-debtor had been terminated by notice for breach of conditions on the part of judgment-debtor. The garnishee was entitled to damages and accounts were being prepared to determine the amount of damages for breach of contract.

It was next contended, that by virtue of Clause 30, if at all the retention of money was payable to judgment-debtor, the architect had not issued the "certificate of practical completion", or "the certificate of completion of making good defects".

The garnishee contended, thirdly, to the effect that Clause 30(4)(a) allowed the employer (i.e., the garnishee) to have recourse to the retention sum for payment of money to which it was entitled under the provisions of the contract. The claim for damages by the garnishee for breach of contract, and for loss in having to engage other contractors to carry on and

complete the work, such claim being consequent to the notice of termination; and also pursuant to Clauses 25(3)(a) and (d) it had recourse to such retention sum and also had priority over the judgment-creditor.

Clause 25(3)(a) and (d) provides as follows:

25(1) If the Contractor shall make default in any one or more of the following respects, that is to say:

(a) If he without reasonable cause wholly suspends the carrying out of the works before completion thereof, or

(b) If he fails to proceed regularly and diligently with the works, or

(c) If he refuses or persistently neglects to comply with a written notice from the architect requiring him to remove defective work or improper materials or goods and by such refusal or neglect the works are materially affected,

or

(d) If he fails to comply with the provisions of Clause 17 of these Conditions,

then the architect may give to him a notice by registered post or recorded delivery specifying the default, and if the contractor either shall continue such default for fourteen days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not), then the employer without prejudice to any other rights or remedies, may within ten days after such continuance or repetition by notice by registered post or recorded delivery forthwith determine the employment of the contractor under this contract provided that such notice shall not be given unreasonably or vexatiously.

(2) In the event of the contractor becoming bankrupt or making a composition or arrangement with his creditors or having a winding up order made or (except for purposes of reconstruction) a resolution for voluntary winding up passed or a receiver or manager of his business or undertaking duly appointed, or possession taken by, or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the floating charge, the employment of the contractor under this contract shall be forthwith automatically determined but the said employment may be reinstated and continued if the employer and the contractor his trustee in bankruptcy liquidator receiver or manager as the case may be shall so agree.

(3) In the event of the employment of the contractor being determined as aforesaid and so long as it has not been reinstated and continued, the following shall be the respective rights and duties of the employer and contractor:

(a) The employer may employ and pay other persons to carry out and complete the works and he or they may enter upon the works and use all temporary buildings, plant, tools, equipments, goods and materials intended for, delivered to and placed on or adjacent to the works, and may purchase all materials and goods necessary for the carrying out and completion of the works.

(b) ...

(c) ...

(d) The contractor shall allow or pay to the employer in the manner hereinafter appearing the amount of any direct loss and/or damage caused to the employer by the determination. Until after completion of the works under para. (a) of this sub-clause the employer shall not be bound by any provision of this contract to make any further payment to the contractor, but upon such completion and the verification within a reasonable time of the account therefor the architect shall certify the amount of expenses

> properly incurred by the employer and the amount of any direct loss and/or damage caused to the employer by the determination, and if such amounts when added to the monies payed to the contractor before the date of determination exceed the total amount which would have been payable on due completion in accordance with this contract, the difference shall be a debt payable to the employer by the contractor; and if the said amounts when added to the said monies be less than the said total amount, the difference shall be a debt payable by the employer to the contractor.

I will set out what, in my judgment, would be the correct principles relevant to the matters in the light of which, the contention of the garnishee can be disposed of for reasons which will then become self-apparent.

Garnishee proceedings are but execution proceedings also, except that instead of chattels, debts are attached. I do not think it can be disputed that a debt is only attachable when it is existing debt, or a debt that has already accrued, the authority for this proposition is *Dunlop Ranken Ltd. v. Hendall Steel Structures Ltd. with Pitchers Ltd. as garnishee* [1957] 3 All ER 344, 346.

Such an existing and accrued debt is still attachable even though payment of it is either deferred or to be made in future that is, such a debt is of a description mentioned by Bankes LJ in *O'Driscoll v. Manchester Insurance Committee (1)* [1915] 113 LT 683, 688 as *debitum in praesenti solvendum in futuro* and such debt was described by Bankes LJ as attachable.

Again, the retention money concerned herein is declared by Clause 30(4)(a) as being money held by the garnishee on trust for the judgment-debtor. The implication would be inevitable that the retention money would belong beneficially to the judgment-debtor. In fact, in *Rayack Construction Ltd. v. Lampeter Meat Co. Ltd.* [1979] 12 BLR 34 (Chancery Division) a clause identical to Clause 30(4)(a) herein, came up to the Court's interpretation in connection with a declaration being sought by a contractor from his employer that the employee was obliged to pay the retention sum into a separate bank account and consequential injunctions, Vinelott J allowed the declaration there.

One cannot lose sight of the fact also that the retention sum was deducted for value of work already and actually done and materials already and actually supplied as certified by the architect to be due.

In my judgment, the retention sum in this case is an existing debt and in fact an existing indebted sum that involves the payment, notionally and irresistibly pursuant to an interim certificate issued by the architect, by the garnishee to the judgment-debtor and the latter's payment in turn back to the garnishee for retention for purposes already stated, with the garnishee holding the money as trustee for the judgment-debtor. A debt in respect of such money began to exist in the circumstances and still does exist, and to contend otherwise would be to defy common sense and logic.

I have no doubt that for damages, and loss to be qualified by Court or an arbitrator later, for alleged breach of contract on the part of the judgment-debtor, the garnishee could have the right to dip into such retention money for satisfaction, but this would depend on one crucial point. If the contract was terminated only after the order to the garnishee to show cause was served on the garnishee, such notice of termination would not affect the right of the judgment-creditor who should therefore have priority over the garnishee. Here, order to garnishee to show cause was served before the notice of termination contract was issued. Please see the judgment of the English Court of Appeal in *Grant Plant Hire v. Trickey, with Beaconsfield Urban Dist. Council as garnishee* [1961] Sol J 105 of the Solicitors' Journal.

Although Clauses 30(4)(b) and (c) provide for even 2 certificates of the architect to be issued before the retention sum would be refunded to the judgment-debtor, such retention sum could still be attached before the issue of such certificates, for they provide for deferred payment only, mentioned by me earlier, as security for making good any defective work, in no way impairing the nature of the retention sum as an existing debt with deferred payment.

For comparison purpose, an interim certificate for payment of value of work done would create a debt but a certificate of practical completion under Clause 30(4)(a) or a certificate of completion of making good defects would not so create an existing debt but merely indicate the time of refund of the retention sum.

In the light of what has been stated above, the 3 contentions of the garnishee will therefore fall to the ground.

I would therefore dismiss the appeal with costs and confirm the garnishee order absolute made by the learned Registrar.

Also found at [1988] 1 CLJ 52